LYE YET YOON & ANOR v. MAJLIS BANDARAYA PULAU PINANG & ANOR

HIGH COURT MALAYA, GEORGETOWN
AZIZAN MD ARSHAD JC
[APPEAL NO: PA-11B-7-06-2024]
4 OCTOBER 2024

Abstract – *A local authority or relevant public works department has a duty of care to maintain trees adjacent to roadways to prevent them from posing a foreseeable danger to road users. If a death occurs due to a fallen tree that was not properly maintained, and it could be demonstrated on the balance of probabilities that the death was caused by the negligence of the responsible authority in failing to maintain the tree, then there is a valid claim for compensation under the Civil Law Act 1956.*

TORT: *Negligence – Damages – Claim against City Council and Public Works Department – Tree fell and hit deceased while deceased rode motorcycle on road – Deceased died due to severe head injury, allegedly hit by fallen tree – Whether negligence established – Whether deceased's cause of death definitively established – Whether tree posed danger – Party responsible in maintaining trees – Civil Law Act 1956, ss. 7 & 8*

LOCAL GOVERNMENT: *City Council – Maintenance of trees – Tree fell and hit deceased while deceased rode motorcycle on road – Deceased died due to severe head injury, allegedly hit by fallen tree – Claim by family members of deceased against City Council for compensation – Whether negligence established – Whether deceased's cause of death definitively established – Whether tree posed danger – Whether City Council responsible in maintaining trees – Local Government Act 1976, s. 101*

The deceased was riding his motorcycle, *en route* home, when a tree unexpectedly fell and hit him, resulting in his immediate death. The medical and postmortem reports indicated that the cause of deceased's death was 'severe head injury' and 'allegedly hit by a fallen tree', respectively. The appellants ('plaintiffs'), the deceased's wife and son, commenced legal proceedings at the Magistrates' Court, against the respondents ('defendants'), the City Council of Penang Island ('first defendant') and the Director of the Public Works Department ('second defendant'), seeking compensation in accordance with ss. 7 and 8 of the Civil Law Act 1956 ('CLA'). The basis of the plaintiffs' action was the alleged negligence of the first and/or second defendants in maintaining the trees adjacent to the roadway, which constituted a violation of the statutory obligations outlined in s. 101 of the Local Government Act 1976. The Magistrate dismissed the plaintiffs' claim

on the ground that the plaintiffs failed to establish the negligence of the defendants. The Magistrate concluded that, *inter alia*: (i) the plaintiffs' omission to call (a) the medical officer who prepared the reports resulted in the inability to definitively establish that the cause of the deceased's death was due to being hit by a fallen tree; and (b) the investigating officer ('IO') and to provide the sketch plan or report resulted in evidentiary deficiencies regarding the determination of the deceased's cause of death; and (ii) the plaintiffs did not provide any evidence that the tree posed a danger. Hence, the present appeal.

Held (allowing appeal; remitting case to Magistrates' Court):

(1) Throughout the entirety of the trial, there were no questions made nor was it proposed that the cause of death was anything other than being hit by a fallen tree. This indicated that the defendants acknowledged that the cause of death was indeed due to being hit by a fallen tree. For the Magistrate to assert that the deceased was not hit by a fallen tree contradicted the established evidence. The Magistrate's conclusion, that the omission to call the medical officer resulted in the inability to definitively establish that the cause of death was due to being hit by a fallen tree, was incorrect and should be ratified. (paras 10 & 12-14)

(2) The stipulations of s. 114(g) of the Evidence Act 1950 are not universally applicable to every situation involving the failure to call witnesses. In this case, it was not necessary to reach out to the IO, as the photographs of the scene and the report from the hospital offered sufficient information. The decision not to call the IO to provide oral evidence would not have an impact on the plaintiffs' case. (para 15)

(3) The parties involved acknowledged the significance of preserving roads, trees and the surrounding landscape. The likelihood suggested that a hazardous situation would develop if the trees were not adequately maintained and these circumstances were sufficient to substantiate this claim. The cause of death was attributable to the fallen tree which was not properly maintained by the first and/or second defendants. (para 40)

(4) The plaintiffs had pleaded sufficient facts to make their claim under s. 7(3)(ii), (3A) and (3B) of the CLA and had submitted sufficient evidence to support their claims. On the balance of probabilities, the plaintiffs had succeeded in proving that the deceased's death was caused by a fallen tree that was caused by negligence. (paras 48 & 51)

(5) The Magistrate's decision was set aside. The case was remitted back to the Magistrates' Court to decide on the issues of: (i) in the negligence that had been proven as a result of the fallen tree incident, who was responsible, either the first and/or the second defendants; (ii) whether the plaintiffs had proven damages or how much should be allowed; and (iii) other reliefs in the statement of claim. (paras 51 & 64)

Case(s) referred to:

Abdul Wahab Mat Rashid v. Juru tera Daerah Jabatan Kerja Raya Daerah Kuala Kangsar & Ors [2025] 3 CLJ 602 HC ***(refd)***

Ahmad Jaafar Abdul Latiff v. Dato' Bandar Kuala Lumpur [2014] 9 CLJ 861 FC ***(refd)***

Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Case [1995] 3 CLJ 639 CA ***(refd)***

Amri Ibrahim & Anor v. PP [2017] 1 CLJ 617 FC ***(refd)***

Bank Of Tokyo-Mitsubishi (Malaysia) Bhd v. Sim Lim Holdings Bhd & Ors [2001] 2 CLJ 474 HC ***(refd)***

Barkway v. South Wales Transport Co Ltd [1950] 1 All ER 392 ***(refd)***

Batang Kali Estates Sdn Bhd v. Romani Abdul Aziz [1995] 3 CLJ 836 HC ***(refd)***

Borneo Co (M) Sdn Bhd v. Penang Port Commission [1975] CLJU 5; [1975] 1 LNS 5 FC ***(refd)***

Chong Khee Sang v. Pang Ah Chee [1983] CLJU 57; [1983] 1 LNS 57 HC ***(refd)***

Dato' Mokhtar Hashim & Anor v. PP [1983] 2 CLJ 10; [1983] CLJ (Rep) 101 FC ***(refd)***

Dr Kok Choong Seng & Anor v. Soo Cheng Lin & Another Appeal [2017] 10 CLJ 529 FC ***(refd)***

Gopinathan Subramaniam v. Timbalan Menteri Dalam Negeri & Ors [1999] 7 CLJ 558 HC ***(refd)***

Joginder Kaur v. Malayan Banking Ltd [1970] CLJU 41; [1970] 1 LNS 41 FC ***(refd)***

Lai Kuit Seong v. PP [1969] CLJU 76; [1969] 1 LNS 76 FC ***(refd)***

Len Omnibus Co Bhd v. North South Transport Sdn Bhd & Anor & Another Appeal [1978] CLJU 96; [1978] 1 LNS 96 FC ***(refd)***

Lionel Edwards Ltd v. State of West Bengal AIR 1967 Cal 191 ***(refd)***

Ma Clyde v. Wong Ah Mei & Anor [1970] CLJU 73; [1970] 1 LNS 73 FC ***(refd)***

Mohd Nazari Ab Majit v. Tan Keo Hock & Anor [1999] 1 CLJ 601 HC ***(refd)***

Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***

Santhi Krishnan v. Malaysia Building Society Bhd [2015] 1 CLJ 1099 CA ***(refd)***

Shiraz Mikael Khan Mohd Rafik Khan v. Projek Lebuhraya Usahasama Bhd & Ors [2022] SMCU 30; [2022] 5 LNS 30 ***(refd)***

U Television Sdn Bhd & Anor v. Comintel Sdn Bhd [2017] 10 CLJ 580 FC ***(refd)***

Legislation referred to:

Civil Law Act 1956, ss. 7(3)(iv), (3A), (3B), 8
Evidence Act 1950, ss. 35, 102, 103, 104, 114(g)
Local Government Act 1976, s. 101(b), (cc)

Other source(s) referred to:

Sarkar on Evidence, 12th edn, Vol 1, p 581

For the appellants - Choo Kian Ming; M/s See Ramsun & Tan
For the 1st respondent - Shaarmila Kanesan; M/s M Kanesan & Assoc
For the 2nd respondent - Nurul Khairiah Dahalaan; SFC

Reported by Najib Tamby

A

JUDGMENT

Azizan Md Arshad JC:

Introduction

B **[1]** This is an appeal filed by the plaintiffs, who are the wife and son of the deceased, challenging the decision of the learned Magistrate that dismissed the plaintiffs' claim after a full trial.

[2] This court, on 30 September 2024, allowed the appeal and remitted the case to be heard and decided by the learned Magistrate on the undecided issues. These issues will be addressed in this judgment. The parties will be C referred to as they were in the Magistrates' Court.

Background Facts

[3] On 30 May 2019, at around 4pm, the deceased was traveling home *via* the route from Jalan Lapangan Terbang Bayan Lepas, He was riding a D motorcycle with registration number of PKF4582. During his journey, a tree unexpectedly fell and is believed to have hit the deceased, resulting in his immediate death.

[4] The plaintiffs have initiated legal proceedings against the City Council (MBPP-(D1) and the Director of the Public Works Department (JKR-D2), E seeking compensation in accordance with ss. 7 and 8 of the Civil Law Act 1956 (CLA).

[5] A total of five witnesses were called to testify. After the full hearing was held, the learned Magistrate dismissed the plaintiffs' claim on the F grounds that the plaintiffs did not establish that the tree had fallen and hit the deceased.

[6] The basis of the plaintiffs' action is the alleged negligence of D1 and/or D2 in maintaining the trees adjacent to the roadway, which constitutes a violation of the statutory obligation outlined in s. 101 of the Local G Government Act 1976 (LGA).

[7] The learned Magistrate has dismissed the claim on the basis that the plaintiff did not establish the negligence of D1 and/or D2 for the following reasons:

H (i) the tree has fallen down and hit the deceased;

(ii) the tree poses a risk (danger) to the public;

(iii) D1 and D2 have statutory duty;

(iv) D1 and D2 have breached the statutory duty; and

I (v) damages.

[8] However, in this case, the learned Magistrate did not address issues (ii), (iii), (iv), and (v) as the plaintiff did not successfully demonstrate (failed) to prove elements (i), (ii) (iii) and (iv) during the trial.

Analysis And Findings

[9] The court's rationale is articulated as follows, drawing upon the reasoning and judgment of the learned Magistrate as well as the arguments presented by the parties involved.

The Question At Hand Is Whether The Plaintiff Was Able To Establish That The Death Of The Deceased Resulted From A Tree Falling And Hitting Him

[10] In this matter, the learned Magistrate has determined that the plaintiffs have failed to established their case. According to the medical report dated 30 May 2019 (P3), prepared by Dr Syaiful Azwan bin Roslan, the medical officer at Hospital Balik Pulau, has concluded that the cause of death was attributed to a "severe head injury".

[11] In the postmortem report (P4) dated 30 May 2019, prepared by Dr Syaiful Azwan bin Roslan, a medical officer at Hospital Balik Pulau, it is indicated that the primary cause of death is attributed to "alleged hit by a fallen tree."

[12] The learned Magistrate acknowledged the points raised by D1 and D2 regarding the absence of the medical officer, which led to an inconclusive determination of the cause of death. In light of the findings presented in the three reports prepared by the medical doctor, the learned HMS concluded that the omission to call the medical officer resulted in the inability to definitively establish that the cause of death was due to being hit by a fallen tree.

[13] The court determined that this conclusion was incorrect and should be ratified by the court.

Cause Of Death

[14] Throughout the entirety of the trial, there were no questions made nor was it proposed that the cause of death was anything other than being hit by a fallen tree. This indicates that D1 and D2 have acknowledged that the cause of death was indeed due to being hit by a fallen tree. Therefore, for the learned Magistrate to assert that the deceased was not hit by a fallen tree contradicts the established evidence.

[15] The learned Magistrate recognises that the plaintiffs' omission to call the investigating officer (IO) and to provide the sketch plan or report has resulted in evidentiary deficiencies regarding the determination of the cause of death. This assertion is flawed. The stipulations of s. 114(g) of the Evidence Act 1950 are not universally applicable to every situation

involving the failure to call witnesses. In this case, it is not necessary to reach out to the investigating officer, as the photographs of the scene and the report from Hospital Balik Pulau offer sufficient information. Photographs and hospital reports have been submitted and marked as exhibits. Once a document is accepted as an exhibit by the court without any objections, it cannot subsequently be disregarded during the trial, as its contents remain uncontested.

[16] In the case of *Mohd Nazari Ab Majit v. Tan Keo Hock & Anor* [1999] 1 CLJ 601; [1998] MLJU 382, where Augustine Paul J (as he then was) cited with approval the following passage in the judgment of AK Das J in *Lionel Edwards Ltd v. State of West Bengal AIR* 1967 Cal 191:

> *Documents are either proved by witnesses or marked on admission. When it is marked on admission without reservation, the contents are not only evidence but are taken as admitted the result being, the contents cannot be challenged either by way of cross-examination or otherwise.*
>
> (emphasis added)

[17] In *Borneo Co (M) Sdn Bhd v. Penang Port Commission* [1975] CLJU 5; [1975] 1 LNS 5; [1975] 2 MLJ 204, the Federal Court cited and affirmed the following passages in *Sarkar on Evidence*, (12th edn), Vol 1 where the learned authors stated at p 581:

> *Documents are either proved by witnesses or marked on admission. When it is marked on admission without reservation, the contents are not only evidence but are taken as admitted, and cannot be challenged by cross-examination or otherwise. In case of documents marked on admission dispensing with formal proof, the contents are evidence, although the party admitting does not thereby accept the truth of the contents which can be challenged by cross-examination or otherwise* (*Lionel Edwards Ltd v. SA* 1967 C 191).
>
> (emphasis added)

[18] It is evident from the photographs, hospital reports and press reports that the incident involving the fallen tree hitting the deceased has been recognised. The decision not to call the investigating officer to provide oral evidence will not have an impact on the plaintiffs' case. Furthermore, D1 and D2 did not assert that the evidence of the investigating officer would support their case if he was called to testify.

[19] In the case of *Bank Of Tokyo-Mitsubishi (Malaysia) Bhd v. Sim Lim Holdings Bhd & Ors* [2001] 2 CLJ 474, held:

> The first letter of demand dated 16.7.1988 was written by the plaintiff to the 2nd and 3rd Defendants. The letter was introduced by PW1 during his examination-in-chief. The AR Cards were also tendered. The said letter and AR Cards were accordingly marked as P15 and P16 A, P16B and P16C. From the records of the proceedings (at page 11, notes of evidence) *the counsel for the 2nd and 3rd Defendants had indicated that he had no objection*

> *to it. The counsel for the 2nd and 3rd Defendants did not ask anything during cross-examination of PW1 on this issue*. Under the circumstance, I am of the opinion that the plaintiff had led relevant evidence which was agreed upon by the counsel for the Defendants and accepted by the court as exhibits P15, P16A, P16B and P16C. *Once evidence is led in court and not objected to by the Defendant's counsel, it is deemed to be admitted in court*.
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> (emphasis added)

Medical And Post-Mortem Report

[20] The medical report was also not challenged and was accepted as exhibit. It was prepared by the medical officer in compliance with s. 35 of the Evidence Act 1950. Furthermore, D1 and D2 did not pose any inquiries concerning this report throughout the trial. D1 and D2 also did not raise any questions regarding this report during the trial. Medical report was accepted unchallenged by D1 and D2 and marked as P3.

[21] In *Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Case* [1995] 3 CLJ 639; [1995] 2 MLJ 770, held that:

> *The content of the second rule may be stated thus. It is essential that a party's case be expressly put to his opponent's is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses*. In the same case, Lord Halsbury had this to say (at p. 76): My Lords, with regard to the manner in which the evidence was given in this case, I cannot too heartily express my concurrence with the Lord Chancellor as to the mode in which a trial should be conducted. *To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to*.
>
> (emphasis added)

[22] The post-mortem report (P4) dated 30 May 2019 (found on p. 210 of the rekod rayuan) indicates that the primary cause of the deceased's death was an alleged impact from a fallen tree, resulting in a severe head injury (refer to pp. 206 to 210 of the rekod rayuan). The court acknowledges that the medical officer will refrain from certifying the cause of death if the historical of the deceased contradicts the determined cause. Consequently, the assertion by the learned HMS that the term "alleged" signifies uncertainty regarding the cause of death is deemed incorrect.

[23] The medical report (P3), the postmortem report (P4), and the death certificate (P5), all dated 30 May 2019, are accepted without challenge. These documents constitute a public record prepared in accordance with s. 35 of the Evidence Act 1950, which stipulates that:

A Relevancy of entry in public record made in performance of duty

An entry in any public or other official book, register or record, stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duty or by any other person in performance of a duty specially enjoined by the law of the country in which the book, register or record is kept, is itself a relevant fact.

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[24] Federal Court's judgment in *Dato' Mokhtar Hashim & Anor v. PP* [1983] 2 CLJ 10; [1983] CLJ (Rep) 101, [1983] 2 MLJ 232:

When it is the duty of a public officer to make some entries in any public or other official book it is admissible in evidence to prove the truth of the facts entered as well as the fact that the entries were made by him although their authenticity be not confirmed by the usual test of truth, namely, the swearing and cross-examination of the person who prepared them.

C

[25] In *Gopinathan Subramaniam v. Timbalan Menteri Dalam Negeri & Ors* [1999] 7 CLJ 558; [2000] 1 MLJ 65, held that s. 35 of the Evidence Act 1950 also applies to a report prepared by a public servant in the discharge of his duties:

D

Although s. 35 refers to a book, register or other official record it has been held that that section also applies to a report if it is proved to have been prepared by a public servant in the discharge of his official duty or by another person in the performance of a legal duty (see *Krishna Nanda v. The State* 1958 AIR Pat 166; *Baldeo Das v. Gobind Das* ILR 36 All 161). Thus, the report, being a document prepared by a public servant in the discharge of his official duty, is admissible under s. 35.

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F **[26]** The learned Magistrate has drawn a conclusion based on the submitted photographs (five images from Penang Kini - P2 A-E) and the news report/ broadcast regarding the incident in Penang Kini (P1). It has been noted that a helmet is positioned beside the deceased, leading to the inference that the deceased may not have been wearing a helmet at the time of the incident. However, no evidence supporting this claim has been provided by any party. Furthermore, the learned HMS has remarked that "if the deceased had been wearing a helmet appropriately, head injury-related accidents could have been prevented." These assertions are purely speculative.

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[27] The learned Magistrate decision regarding the deceased's placement was influenced by her own knowledge. If this fact is to be considered, then the burden of proof will shift to the defendant. According to the D1 and D2's defence, the deceased has placed himself at risk and in danger. During the full hearing, the defendants, either through questions against the witnesses or through the testimony of the witnesses themselves, did not raise or suggest that the death of the deceased was not caused by a fallen tree on the road. In *Santhi Krishnan v. Malaysia Building Society Bhd* [2015] 1 CLJ 1099, held:

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> *It is an elementary proposition of law, that cases must be decided on the evidence and that the evidence must be such as is relevant and admissible under the Evidence Act 1950, that is, it must be either from admitted documents or the statement of witnesses or be something of which the court can take judicial notice. The learned judge cannot without giving evidence as a witness import into a case his own personal knowledge of particular facts so as to help out evidence for the respondent* which would otherwise be inadequate to rebut the appellant's case (*PP v. Sharma Kumari* [2000] 3 CLJ 596; [2000] 6 MLJ 254; *Low Moh & Anor v. Public Prosecutor* [1953] 1 LNS 51; [1954] MLJ 14 and *Public Prosecutor v. Lee Ee Teong* [1953] 1 LNS 74; [1953] 1 MLJ 244)
>
> (emphasis added)

[28] The sole witness for D1, Encik Azizul Fahmi bin Muhamad, who serves as the landscape director of the landscape department (SD1), acknowledged during questioning by the plaintiffs' counsel that a tree had fallen, resulting in a fatality (notes of evidence at p. 51 of the record rayuan),

[29] It is unnecessary to call an expert or investigating officer for clarification, as the existing evidence is adequate for the plaintiffs to substantiate or to prove their case.

[30] In *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221; [1987] 1 MLJ 492, where His Lordship, Mohd Azmi (as he then was), in delivering the judgment of the court held:

> It is essential to appreciate the scope of s. 114(g) lest it be carried too far outside its limit. Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document, but material document by a party in his possession, or for non-production of not just any witness but an important and material witness to the case.

[31] In *Amri Ibrahim & Anor v. PP* [2017] 1 CLJ 617, held as follows:

> [56] The issue of the non-calling of Phee Chin Guan was argued before the Court of Appeal by the defence. The Court of Appeal held *inter alia* that Phee Chin Guan was not an essential or material witness to the prosecution in order to establish a *prima facie* case at the close of it is case or to prove its case beyond reasonable doubt at the end of the defence case and the non-calling of Phee Chin Guan did not leave a gap in the prosecution's case. It was also held that on the facts of the case, the learned trial judge did not err in not invoking s. 114(g) of the Evidence Act 1950 against the prosecution.
>
> [57] The power of the court to draw an adverse inference under s. 114(g) Evidence Act 1950 is discretionary. It depends on the circumstance of the case and particularly in cases where the material witnesses are not produced (see *Lau Song Seng v. PP* [1998] 1 SLR 663]. The scope of s. 114(g) has been explained by the Supreme Court In *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 at p. 223;; [1987] 1 MLJ 492 at p. 494:

> ... It is essential to appreciate the scope of section 114(g) lest it be carried too far outside its limit. Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document, but material document by a party In his possession, or for non-production of not just any witness but an important and material witness to the case.

[32] In this case, it is also important and essential to recognise that there exists a plausible rationale for the absence of the investigation officer's attendance. The plaintiffs are uncertain about the presence of the investigating officer who looked into this incident, and they have been unable to locate the investigating officer. When asked by learned counsel for D1, D2 informed the court that he was never summoned for an interview by the investigating officer. The following is a excerpt from the relevant notes of evidence:

PD2 : Baik selepas kamu buat laporan polis ini, ada tak pegawai penyiasat tanya tentang ini untuk memberi keterangan?

SP1 : Tidak.

PD2 : Tidak, tidak ada panggilan telefon daripada pegawai penyiasat?

SP1 : Tidak.

There Is No Complaint About That The Tree

[33] In this case, the learned HMS cited the case of *Ahmad Jaafar Abdul Latiff v. Dato' Bandar Kuala Lumpur* [2014] 9 CLJ 861; [2014] MLJU 1913, which concluded that the plaintiff did not provide any evidence indicating that the tree posed a danger. The defence from D1 and D2 contends that the plaintiffs have not summoned any expert (arborist) to assert or declare that the tree is a danger to the public.

[34] The learned Magistrate has concurred with this argument and determined that the plaintiffs have not successfully established this fact. The court concluded that the learned Magistrate erred in its application of the principles from the *Ahmad Jaafar* (*supra*), as it was a ruling from the Federal Court, without recognising that in the *Ahmad Jaafar* (*supra*), the Federal Court explicitly articulated the duties. Even though s. 101 of the Local Government Act 1976, by its plain words, purports to confer powers upon local authorities, the Federal Court in *Ahmad Jaafar* (*supra*) held that s. 101 (b) and (cc) of the Local Government Act 1976 is not absolute but relative and depend on any given factual situation.

[35] The D1 and D2 contended that there was no assertion or complaint regarding the tree posing a danger to road users or the public. This claim is inaccurate, as the minutes of the meeting indicate otherwise. In the minutes of the meeting "Mesyuarat 1/2019 dated 25 February 2019 at p. 2231 of rekod rayuan, the record of the minutes indicates that:

(i) Puan Nor Rezan (paragraph (ii)) clearly stated that "bahawa banyak aduan awam diterima oleh MBPP terutama dari jalan Persekutuan Lebuhraya Dr Lim Chong Eu sehingga jambatan Kedua Pulau Pinang **tidak diselenggarkan membabitkan pokok dan lanskap** ..." (Jalan Dr Awang leading to airport); and

(ii) Dr Rahizuwan (parahraph (iv) page 226: Disamping itu sekiranya berlaku **kemalangan atau kematian akibat dari proses penyelenggaran yang tidak sempurna** ... .

(emphasis added)

[36] The evidence provided by DW4 – YB Zahril Khir Johari, the executive council member (EXCO) responsible for the public works department (JKR) indicates an acknowledgment that "the roads are not regularly maintained and the trees are not properly maintained".

[37] Ir Ts Hafezaa Dzulieanaa binti Md Puzi (SD2) who testified on behalf of D2 in her questions by learned counsel for the plaintiff, has confirmed that on the date of the incident, or before or after that, D2 did not take any action to maintain the trees on the side of the road, while D1 has taken the position that responsibility to maintain the trees on the side of the road only starting on 1 August 2019.

[38] In this instance, the matter of tree maintenance between D1 and D2 arises. However, it is clear that both D1 and D2 recognise the necessity of maintaining these trees. Furthermore, the recognition that the principals were not honoured is adequate to demonstrate that either party, D1 or D2, has not fulfilled their obligations under s. 101 of the Local Government Act 1976. This alone is sufficient, and there is no requirement for the plaintiffs to establish that a complaint regarding the hazardous nature of the tree exists prior to the court determining that the tree poses a danger.

[39] In this case, both D1 and D2 have invoked the defence of an Act of God. However, the court determined that this defence lacked validity, as there was no evidence to suggest that the tree's fall was due to factors beyond the control of D1 and/or D2, such as a storm, heavy rain, landslides, flood or destruction due to natural factors. Consequently, this defence is unfounded.

[40] It is clear that the involved parties have acknowledged the significance of preserving roads, trees, and the surrounding landscape as outlined in documents D20, D21, and D22. The likelihood suggests that a hazardous situation will develop if the trees are not adequately maintained, and these circumstances are sufficient to substantiate this claim. Consequently, this court has determined that the cause of death was attributable to the fallen tree, which was not properly maintained by D1 and/or D2, rather than the assertion that the deceased failed to exercise ordinary care, caution, and maritime skill.

[41] In *Len Omnibus Co Bhd v. North South Transport Sdn Bhd & Anor & Another Appeal* [1978] CLJU 96; [1978] 1 LNS 96; [1978] 2 MLJ 246, held that:

> In my opinion the learned judge had correctly applied the law to the facts of the present case. It is well established that the duty of the appellants as an estate owner was to take such steps as a reasonable and prudent landowner would take, and the question was one of fact whether their conduct infringed this requirement. This was the test adopted by Lords Normand and Reid in *Caminer v. Northern & London Investment Trust, Limited* [1951] AC 88 and which was applied in the local case of *Thean Chew v. The Seaport (Selangor) Rubber Estate Ltd* [1960] MLJ 166 This test postulates not expert knowledge on their part but some degree of knowledge as a reasonable and prudent landowner would possess. Accordingly, an estate owner who has rubber trees growing on his estate adjoining the highway is not expected to possess scientific knowledge of diseases that may affect the trees but he is expected as a reasonable and prudent landowner to inspect the trees from time to time to assess their safety and if there is a danger of one of those trees falling on the highway, and possibly injuring someone who is using the highway, it is his duty to have that tree removed which is found to be dangerous.

[42] Learned counsel for D1 has relied on *Batang Kali Estates Sdn Bhd v. Romani Abdul Aziz* [1995] 3 CLJ 836; [1995] 3 MLJ 104 and *Shiraz Mikael Khan Mohd Rafik Khan v. Projek Lebuhraya Usahasama Bhd & Ors* [2022] SMCU 30; [2022] 5 LNS 30; [2022] MLJU 213 in his submission which was accepted by the learned Magistrate and referred to in her judgment.

[43] The facts in *Batang Kali Estates* (*supra*) and *Shiraz Mikael Khan* (*supra*) cases are different from the cause here. The learned Magistrate's reference to the case of *Batang Kali* (*supra*) is not relevant because it involved a storm at the time of the incident, which was a key factor in their decision-making. It must also be borne in mind that "negligence is a question of fact and not of law, that each case must depend on its own fact" (refer to *Ma Clyde v. Wong Ah Mei & Anor* [1970] CLJU 73; [1970] 1 LNS 73; [1970] 2 MLJ 183). In both cases, it is a fact that it cannot be disputed that there was a thunderstorm at the scene of the accident. Description submitted by D1 here cannot show that there was a thunderstorm at the place and time of the incident.

[44] In this case the learned Magistrate did not decide who was responsible for maintaining the tree. In establishing responsibility, the subsequent case may serve as a reference for the learned Magistrate, specifically:

(i) the Federal Court in the case of *Dr Kok Choong Seng & Anor v. Soo Cheng Lin & Another Appeal* [2017] 10 CLJ 529; [2018] 1 MLJ 685 stated:

> The law of negligence is no stranger to the concept of positive duty to protect another from harm. Positive duty to guard against harm caused by a third party may arise from a special relationship

> between the plaintiff and the defendant, giving rise to an assumption of responsibility by the defendant, or where a risk or a source of danger has been created (*Smith v. Littlewoods Organization Ltd* [1987] AC 241; *Mitchell v. Glasgow City Council* [2009] 1 AC 874.

(ii) in *Ahmad Jaafar* (*supra*), held that:

> I begin by stating that those duties imposed upon a local authority by section 101(b) and (cc) are *not absolute but relative and depend on any given factual situation. There is nothing therein that imposes a higher obligation upon a local authority or in the nature of strict liability. The common law on negligence vis-à-vis such duties has not been varied by the Act. It is therefore only to that extent the duty of care is imposed upon a local authority by section 101(b) and (cc) of the Act*.
>
> (emphasis added)

Whether The Tree In Question Fell Due To A Thunderstorm/Bad Weather?

[45] Exhibit D18, is a thunderstorm warning issued by the Department Malaysian Meteorology (p. 238 of the rekod rayuan) for Penang. It only deals with thunderstorm warnings and not weather reports that a thunderstorm had actually occurred. Moreover, a warning said only for the time from 12.30 midnight until 2am only the accident happened at approximately 4:00 evening,

[46] Exhibit D19 is the weather report on 30 May 2019 from the website timeanddate.com (refer pp. 239-240 of the rekod rayuan) and it is not specifically stating which areas of Penang suffered thunderstorm at 4pm, whereas on that day, the weather was good, no thunderstorm and the wind speed was only 13km/h.

Other Issues

Insufficient Facts To Prove Damages

[47] Learned counsel for the defendant argued that no sufficient facts pleaded by the plaintiffs to make a claim here, under ss. 7 and 8 of the Civil Law Act 1956. The plaintiffs argued that they did not seek or claim for damages under s. 7(3)(iv) and s. 8 of the Civil Law Act 1956 but under ss. 7(3)(ii), 7(3A) and 7(3B) of the said Act.

[48] This court finds that the plaintiffs have actually pleaded sufficient facts to make their claim under ss. 7(3)(ii), 7(3A) and 7(3B) of the Civil Law Act 1956 and also submit sufficient evidence to support their claims. But, the issue raised by learned counsel for D2 is not mentioned or decided by the learned Magistrate. Both did not file a cross-appeal to appeal the decision of the learned Magistrate regarding this issue, therefore this issue is no longer relevant in this appeal.

[49] The decision in the case of *Chong Khee Sang v. Pang Ah Chee* [1983] CLJU 57; [1983] 1 LNS 57; [1984] 1 MLJ 377, which was referred by learned counsel for D2 does not apply. In the present instance, throughout the full trial, the exhibits were accepted without any objections or challenges. The case of *Chong Khee Sang* (*supra*), has indeed provided "conditional consent for the acceptance" of the documentary evidence submitted by the plaintiff in that particular matter.

[50] However, it is trite law that the burden of proof lies on the party that asserts the existence of a fact (ss. 101, 102 and 103 of the Evidence Act 1950). The Federal Court in *U Television Sdn Bhd & Anor v. Comintel Sdn Bhd* [2017] 10 CLJ 580; [2017] 1 LNS 1400; [2017] 5 MLJ 292, at p. 305, explained the meaning and application of the term 'burden of proof' in ss. 101, 102 and 103 of the Evidence Act 1950 as follows:

> [35] On the meaning and application of the term 'burden of proof' section 101 of the Evidence Act 1950 ('the Act') states that it is the burden to establish a case which rests throughout on the party who assert the affirmative of the issue. The 'burden of proof' in section 102 of the Act is the burden to adduce evidence, to make out or rebut the claim. The 'burden of proof' in section 102 of the Act shifts from one side to the other according to the weight of the evidence.
>
> [36] In the Federal Court's case of *Letchumanan Chettiar Alagappan @ L Allagappan & Another v. Secure Plantation Sdn. Bhd.* [2017] 5 CLJ 418 his lordship Jeffrey Tan, FCJ cited with approval the principle laid down in the case of *Ranchhodbhai v. Babuhai* AIR 1982 Guj 308 as regards the 'burden of proof' to establish a case which never shift and the shifting burden to adduce evidence in the context of sections 101 and 102 of the Indian Evidence Act which are identical to sections 101 and 102 of our Act as follows:
>
> > It is also well to bear in mind that there is an essential distinction between 'burden of proof' and 'onus of proof'; burden of proof lies upon the person who has to prove a fact and it never shifts, but the onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence. [See *Raghavamma v. Chenchamma*, AIR 1964 SC 136]. Burden of proof has two distinct meanings, namely, (i) the burden of proof as a matter of law and pleadings, and (ii) the burden of proof as a matter of adducing evidence. Section 101 of the Evidence Act deals with the former and s. 102 of the Evidence Act with the latter. The first remains constant but the second shifts. In a claim application, therefore, the burden of proof, in the first sense, certainly lies on the claimant. If he examines himself and his witness, if any, and if the evidence, tested in the light of the principle as set out above, is found to be acceptable, the onus shifts on the tortfeasor to prove those circumstances, if any, which dislodge the assertions of the claimants. If the tortfeasor fails to prove before the court any fact or circumstance which tends to affect the evidence led by the

> claimant, the claimant would be entitled to ask the court to hold that he has established the case and, on that basis, to make a just award it would thus appear, that though the legal burden, – the burden as a matter of law and pleadings – remains constant on the claimant, the burden as a matter of adducing evidence changes often times as the trial of the claim petition progresses.

[51] On the balance of probabilities, the plaintiffs had succeeded in proving that the deceased's death was caused by a fallen tree that was caused by negligence. The learned Magistrate's decision was set aside and no order to costs on this appeal.

Maxim "Res Ipsa Loquitor"

[52] It is trite law that in order for the doctrine of *res ipsa loquitor* to apply, there are three conditions that must be established as follows:

(i) that the occurrence is such that it would not have happened without negligence;

(ii) the thing that inflicted the damage was under the sole management and control of the defendant or of someone for whom he is responsible or whom he has a right to control; and

(iii) there must be no evidence as to how or why the occurrence took place.

[53] In *Ahmad Jaafar* (*supra*) at p. 885, the Federal Court held that:

> It was held that the 'fundamental basis of the maxim (*res ipsa loquitor*) is that the rule that it is for the plaintiff to prove negligence and not for the defendant to disprove it, may cause hardship to the plaintiff if it is impossible for him to know what precise acts of omission led to his damage, and this is most obviously so where the cause of damage peculiarly within the means of knowledge of the defendant who caused it. This hardship can sometimes be avoided by the application of the maxim '*res ipsa loquitor* ... It should also be noted that the doctrine is not a rule of substantive law but rather a principle of evidence. The doctrine *res ipsa loquitor* does not prove negligence. It only infers the negligence.

[54] In *Joginder Kaur v. Malayan Banking Ltd* [1970] CLJU 41; [1970] 1 LNS 41; [1971] 1 MLJ 98, at p. 99, the Federal Court applied the *dicta* of Ong Hock Thye CJ in *Lai Kuit Seong v. PP* [1969] CLJU 76; [1969] 1 LNS 76; [1969] 1 MLJ 182, which stated as follows:

> **The doctrine does not apply where the cause of the accident is known … the res speaks because, and only because where the accident stands unexplained**, the known facts and circumstances, however meagre, may be such that want of reasonable care is safely attributable to the person but for whose negligence the accident could not have happened ... conversely *res ipsa loquitor* cannot be relied on where the res is ambivalent.
>
> (emphasis added)

[55] In relation to the current matter, this court hold the opinion that, given the facts and circumstances presented, this principle is not relevant due to the substantial evidence available regarding the circumstances of the incident. The doctrine of *res ipsa loquitur* did not apply in this case as all the facts of the case are known such that they would explain the cause of the incident in the case of *Barkway v. South Wales Transport Co Ltd* [1950] 1 All ER 392, Lord Porter stated:

> The doctrine is dependent on the absence of explanation, and although it is the duty of the defendants, if they desire to protect themselves, to give an adequate explanation of the cause of the accident, yet, if the facts are sufficiently known, the question ceases to one where the facts speak for themselves, and the solution is to be found by determining whether, on the facts as established, negligence is to be inferred or not.

[56] As such, the burden remained with the plaintiffs to establish negligence and breach of statutory duty, which the court has already decided that the plaintiffs have succeeded in proving it on the balance of probabilities.

The Matter Not Decided By The Learned Magistrate

[57] The issue of who is responsible and related to the plaintiff's claim, including other related issues that have been raised by the parties during the trial, including compensation, must be decided by the Magistrates' Court.

[58] The learned Magistrate did not make any decision regarding who should be held responsible for this negligence under the Local Government Act 1976 and whether the plaintiffs are eligible for compensation or damages.

[59] The parties have presented arguments concerning the liability of either D1 or D2. However, the court concurred with the Magistrate's assessment that there was no necessity to pursue this matter further, given the plaintiffs' inability to establish negligence before the Magistrates' Court.

[60] But it seems that negligence has been established, this court has remitted this case to be decided by the learned Magistrate. The Magistrates' Court is tasked with determining who should be held liable for the negligence related with the fallen tree, in accordance with s. 101 of the Local Government Act 1976. The relevant s. 101(b) and (cc) of the Act states that:

> In addition to any other powers conferred upon it by this Act or by any other written law, a local authority shall have powers to do all or any of the following things, namely:
>
> (b) to plant, trim or remove trees;
>
> (cc) to require the owner or occupier of any premises to do any of the following acts:

(i) To remove, lower or trim to the satisfaction of the local authority any tree, shrub or hedge overhanging or interfering in any way with the traffic on any road or street or with any wires or works of the local authority is likely to endanger the public safety or convenience and in the event of any tree situated in private premises falling across any public road or street the local authority may remove the fallen tree and the expenses shall be charged on and recoverable from the owner or occupier thereof

(ii) To remove any dilapidated fence or structure abutting upon any public place and if such owner or occupier fails to comply with any such request any authorised officer of the local authority may enter upon the said premises and carry out such work and the provisions of section 115 shall apply to the expenses incurred thereby.

[61] It is necessary to determine if the responsibility continues to lie with D2 or if it has been shifted to D1 during the incident. In such incidents, it is essential to identify a responsible party; however, this does not extend the accountability or responsibility of that party beyond the legal provisions. In the case of *Ahmad Jaafar* (*supra*), held that:

> *[62] I begin by stating that those duties imposed upon a local authority by s. 101(b) and (cc) are not absolute but relative and depend on any given factual situation. There is nothing therein that imposes a higher obligation upon a local authority or in the nature of strict liability. The common law on negligence vis-a-vis such duties has not been varied by the Act. It is therefore only to that extent the duty of care is imposed upon a local authority by s. 101(b) and (cc) of the Act.*
>
> (emphasis added)

[62] The determination of whether responsibility has shifted according to the assignment of duties and responsibilities between D1 and D2, or whether D2 retains responsibility as stated under s. 101 of the Local Government Act 1976, at the time of the incident, will be determine and decided by the learned Magistrate.

[63] In *Abdul Wahab Mat Rashid v. Jurutera Daerah Jabatan Kerja Raya Daerah Kuala Kangsar & Ors* [2025] 3 CLJ 602, held that:

> [37] *Thus, did the Defendants in this case, namely the District Engineer, the JKR, the State Government and the subcontractor for road maintenance, owe a duty of care to the plaintiff*? The general rule in regard to local authorities is that statutory powers conferred on those authorities are capable of imposing a duty of care on local authorities: *Anns v. Merton London Borough Council* [1978] AC 728. The Federal Court in the case of *Dr Kok Chong Seng & Anor v. Soo Cheng Lin (and Another Appeal)* [2017] 10 CLJ 529; [2018] 1 MLJ 685 stated:
>
> > *The law of negligence is no stranger to the concept of positive duty to protect another from harm. Positive duty to guard against harm caused by a third party may arise from a special relationship between the plaintiff and the*

A *defendant, giving rise to an assumption of responsibility by the defendant, or where a risk or a source of danger has been created* (*Smith v. Littiewoods Organisation Ltd* [1987] AC 241; *Mitchell v. Glasgow City Council* [2009] 1 AC 874.

(emphasis added)

B **[64]** Premised upon the above considerations, the court found that appellate intervention was justified. As a result, this case is remitted back to the Magistrates' Court to decide on the issue of:

(i) in the negligence that has been proven as a result of this fallen tree incident, who is responsible, either the first defendant and/or the second
C defendant;

(ii) whether the plaintiff has proved damages or how much should be allowed; and

(iv) others relief in the SOC.

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